

1 TONY WEST  
 Assistant Attorney General  
 2 ELIZABETH J. SHAPIRO  
 Deputy Branch Director  
 3 BRIGHAM J. BOWEN (DC Bar No. 981555)  
 Trial Attorney  
 4 United States Department of Justice  
 Civil Division, Federal Programs Branch  
 5 Post Office Box 883  
 Washington, D.C. 20044  
 6 Tel: (202) 514-6289  
 Fax: (202) 307-0449  
 7 brigham.bowen@usdoj.gov

8  
 9 UNITED STATES DISTRICT COURT  
 DISTRICT OF ARIZONA

10 KENNETH ALLEN,  
 11 Plaintiff,

09-CV-00373-TUC-FRZ

12 v.

13 DEPARTMENT OF HOMELAND  
 14 SECURITY and U.S. DEPARTMENT OF  
 STATE, *et al.*,  
 15 Defendants.

**DEFENDANTS' CONSOLIDATED  
 REPLY IN SUPPORT OF  
 DEFENDANTS' PARTIAL MOTION  
 TO DISMISS AND OPPOSITION TO  
 PLAINTIFF'S MOTION FOR A  
 VAUGHN INDEX**

16  
 17  
 18 As demonstrated in Defendants' partial motion to dismiss [Dkt. #15], Plaintiff's  
 19 Freedom of Information Act ("FOIA") requests concerning President Barack Obama and/or a  
 20 person named "Barry Soetoro" fail to comply with agency regulations that require valid  
 21 privacy waivers before agencies will begin searching for records relating to living third party  
 22 individuals. Because of this failure to comply, insofar as Plaintiff's Amended Complaint  
 23 seeks such records, it must be dismissed for failure to exhaust administrative remedies.  
 24 Plaintiff's request for a *Vaughn* index [Dkt. #20] must also be rejected.

25 **ARGUMENT**

26 Mr. Allen's objection largely ignores — and therefore concedes — the grounds for  
 27 dismissal set forth in Defendants' motion. Allen does not contest that the applicable agency  
 28

1 regulations<sup>1</sup> have been validly promulgated, nor does he contest that by failing to submit  
2 valid privacy waivers from the purported targets of his inquiries, he failed to comply with  
3 these regulations. Likewise, Allen fails to counter settled law holding that compliance with  
4 agency FOIA regulations is mandatory and that, accordingly, where requesters fail to comply  
5 with such regulations, their FOIA claims must be dismissed. 5 U.S.C. § 552(a)(3)(A); *Dale*  
6 *v. IRS*, 238 F. Supp. 2d 99, 103 (D.D.C. 2002); *see also In re Steele*, 799 F.2d 461, 465-66  
7 (9th Cir. 1986) (observing that exhaustion of administrative remedies is “required under the  
8 FOIA before that party can seek judicial review” and that “[w]here no attempt to comply  
9 fully with agency procedures has been made, the courts will assert their lack of jurisdiction  
10 under the exhaustion doctrine”).

11       Rather than address these dispositive issues, Allen’s objection focuses on other  
12 matters, most of which are irrelevant to the legal questions presented in Defendants’ motion,  
13 and none of which provide any grounds for avoiding dismissal. Most prominent is the  
14 repeated contention that Allen is not seeking records concerning President Obama, but is  
15 only seeking records concerning a separate individual he identifies as “Barry Soetoro.” *See*  
16 *Pl.’s Objection* at 2, 3, 4. This being the case, Plaintiff apparently does not (and could not)  
17 object to the dismissal of any and all claims relating to records concerning the president, and  
18 dismissal is therefore manifestly warranted as to such records.

19       As to the requests for records concerning Barry Soetoro, Allen’s arguments avail him  
20 nothing. Allen appears, for example, to rely on the notion that the Privacy Act “does not  
21 apply to foreigners” to contend that the Defendants’ privacy-waiver regulations do not apply  
22 to records concerning Barry Soetoro (apparently presumed to be a non-permanent-resident  
23 alien). *Pl.’s Objection* at 2. Even assuming such a person exists and is an alien — which the  
24 government does not concede — this Privacy Act argument is a red herring. Although the  
25 policies which inform the Privacy Act similarly inform the FOIA, it has long been held that

---

26                   <sup>1</sup> 22 C.F.R. § 171.12(a) (Department of State (“DOS”)); 6 C.F.R. §§ 5.3, 5.21(f)  
27 (Department of Homeland Security (“DHS”)).

1 all aliens enjoy privacy rights co-extensive with those held by U.S. citizens under the FOIA.  
2 *Judicial Watch, Inc. v. DHS*, 514 F. Supp. 2d 7, 9 n.4 (D.D.C. 2007) (“[F]oreign nationals are  
3 entitled to the same privacy rights under FOIA as United States citizens”); *Schiller v. INS*,  
4 205 F. Supp. 2d 648, 662 (W.D. Tex. 2002) (“Aliens [and] their families ... have a strong  
5 privacy interest in nondisclosure of their names, addresses, and other information which  
6 could lead to revelation of their identities”). The alleged citizenship status of Barry Soetoro,  
7 then, is immaterial to Allen’s obligation to comply with Defendants’ regulations.

8 Allen also contends that he was not given notice of his right to appeal and that some  
9 of his requests did not receive responses within the statutory twenty-day deadline, apparently  
10 to support the argument that he has constructively exhausted his administrative remedies and  
11 may pursue his suit. Pl.’s Objection at 7-8, 12. While it is true that where an agency fails to  
12 timely respond to a FOIA request and/or fails to provide notice of the right to appeal an  
13 agency determination, a litigant may be deemed to have constructively exhausted his  
14 administrative remedies, these circumstances do not excuse the litigant from complying with  
15 *other* regulatory or statutory requirements, such as the payment of fees and, as here,  
16 compliance with agency privacy regulations. *See Ramstack v. Dep’t of Army*, 607 F. Supp.  
17 2d 94, 102-103 (D.D.C. 2009) (plaintiff failed to exhaust administrative remedies because  
18 request failed to comply with agency regulations, even though agency response was not  
19 provided by statutory deadline); *Lee v. DOJ*, 235 F.R.D. 274, 286 (W.D. Pa. 2006)  
20 (dismissing FOIA claims, despite agency failure to respond, because plaintiff failed to verify  
21 his identity in accordance with agency regulations).<sup>2</sup>

22 Nor does Allen’s argument that a supposed public interest in personal documents  
23 concerning Barry Soetoro — presuming such a person exists — justify excusing Allen from  
24 his exhaustion obligations. *See* Pl.’s Objection at 9. Personal information of the sort sought

---

25 <sup>2</sup> A contrary rule would upend the FOIA’s statutory scheme by excusing the vast  
26 majority of requesters (who do not receive agency responses within twenty working days, as  
27 required by the FOIA) from the statutory requirement to comply with agency FOIA  
28 regulations. *See* 5 U.S.C. § 552(a)(3)(A).

1 by Allen, which fails to reveal the operations or activities of government at any meaningful  
2 level, “falls outside the ambit of the public interest that the FOIA was enacted to serve.”  
3 *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989);  
4 Def.’s Mot. to Dismiss at 4. As explained by the U.S. Citizenship and Immigration Service  
5 (“USCIS”) in its September 17 letter determination regarding Allen’s appeal, USCIS records  
6 responsive to Allen’s request, should they exist, would be contained in USCIS’s *Alien*  
7 *File/Central Index System*, a document system which contains individualized records  
8 regarding aliens who have sought benefits under the Immigration and Nationality Act. Def.’s  
9 Ex. F (USCIS Appeal Determination) at 1-2; *see also* Def.’s Ex. J (DOS June 1, 2009 Ltr) at  
10 5-7. Such records contain “sensitive, intimate details lifted from the lives of identifiable  
11 private individuals” and have a privacy value similar to information generally found in  
12 personnel files, which are protected from disclosure under the FOIA. USCIS Appeal  
13 Determination at 1-2; 5 U.S.C. § 552(b)(6); *Ligorner v. Reno*, 2 F. Supp. 2d 400, 405  
14 (S.D.N.Y. 1998). Disclosure of this information (or similar information held by the  
15 Department of State) would do nothing “to open agency action to the light of public  
16 scrutiny” or “to inform the citizenry ‘about what their government is up to.’” *Rosenfeld v.*  
17 *U.S. Dep’t of Justice*, 57 F.3d 803, 811 (9th Cir. 1995) (quoting *Reporters Comm.*, 489 U.S.  
18 at 773).

19 Should Allen have a genuine interest in the “the implementation of the Government’s  
20 immigration policy,” Pl.’s Objection at 9, there are myriad other avenues he could explore  
21 (via the FOIA or otherwise) to obtain information short of a fishing expedition for personal  
22 details, barred from disclosure by the FOIA, regarding a single individual he imagines may  
23 exist. The Defendants’ privacy regulations are designed to prevent precisely this kind of  
24 unwarranted intrusion into the private information of individuals, and the Court should not  
25 countenance Allen’s attempt to evade his obligation to comply with those regulations.

26 Finally, Allen’s calls for segregability determinations and for a *Vaughn* index  
27 similarly miss the mark. Because it is known even prior to any search for documents that the  
28

1 information sought by Allen, if it exists (i.e., private information regarding a third party  
2 individual), is itself protected from disclosure, there is no need for an additional segregability  
3 determination. *Cotton v. Adams*, 798 F. Supp. 22, 27 (D.D.C. 1992) (determining that  
4 releasing any portion of the documents would “abrogate the privacy interests” when the  
5 request is for documents pertaining to two named individuals); *Schonberger v. NTSB*, 508 F.  
6 Supp. 941, 945 (D.D.C. 1981) (stating that no segregation was possible when request was for  
7 one employee’s file), *aff’d*, 672 F.2d 896 (D.C. Cir. 1981) (unpublished table decision). And  
8 the *Vaughn* index is a creature of litigation, designed to allow the *Court*, at the summary  
9 judgment stage, to evaluate the basis for an agency’s withholdings. It is not required during  
10 the administrative process at all, much less where, as here, (1) there are no documents to  
11 index (because there has been no search); and (2) the requester has failed to comply with  
12 agency regulations and is therefore barred from attempting to subject Defendants’ responses  
13 to his unperfected requests to judicial review. *See, e.g., Schaake v. IRS*, No. 91-958, 1992  
14 U.S. Dist. LEXIS 9418, at \*9-\*11 (S.D. Ill. June 3, 1992); *SafeCard Servs. v. SEC*, No.  
15 84-3073, slip op. at 3-5 (D.D.C. Apr. 21, 1986); *see also Judicial Watch, Inc. v. Clinton*, 880  
16 F. Supp. 1, 11 (D.D.C. 1995) (“Agencies need not provide a Vaughn Index until ordered by a  
17 court after the plaintiff has exhausted the administrative process.”), *aff’d on other grounds*,  
18 76 F.3d 1232 (D.C. Cir. 1996).

## 19 CONCLUSION

20 FOIA requesters must comply with agency regulations, and Allen (who disclaims any  
21 interest in records concerning President Obama) has failed to do so with regard to his  
22 requests for records concerning “Barry Soetoro.” The Court should therefore grant  
23 Defendants’ partial motion to dismiss Plaintiff’s Amended Complaint and deny Allen’s  
24 motion for a *Vaughn* index.<sup>3</sup>

---

25  
26 <sup>3</sup> Defendants also request that the Court dismiss John Does 1 through 49 as  
27 defendants in this lawsuit. *See* Mot. to Dismiss at 6 n.6 (observing that Allen only intends to  
28 maintain his suit against DHS and DOS and requesting dismissal).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Dated: November 5, 2009

Respectfully submitted,

TONY WEST  
Assistant Attorney General

ELIZABETH J. SHAPIRO  
Deputy Branch Director

s/ Brigham J. Bowen  
BRIGHAM J. BOWEN  
Trial Attorney  
United States Department of Justice  
Civil Division, Federal Programs Branch  
Tel: (202) 514-6289  
Fax: (202) 307-0449  
brigham.bowen@usdoj.gov

Mailing Address:  
Post Office Box 883  
Washington, D.C. 20044

Courier Address:  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20001

*Attorneys for Defendants*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2009, I caused a copy of the foregoing Consolidated Reply in Support of Defendants’ Partial Motion to Dismiss and Opposition to Plaintiff’s Motion for a *Vaughn* Index be sent via first-class mail, postage pre-paid, to:

Kenneth L. Allen  
10055 E. Gray Hawk Dr.  
Tucson, AZ 85730

November 5, 2009

*s/ Brigham J. Bowen*